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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 732

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JAMES E. FARRAR

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

FILED MARCH 12, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 732

THE UNITED STATES OF AMERICA, APPELLANT

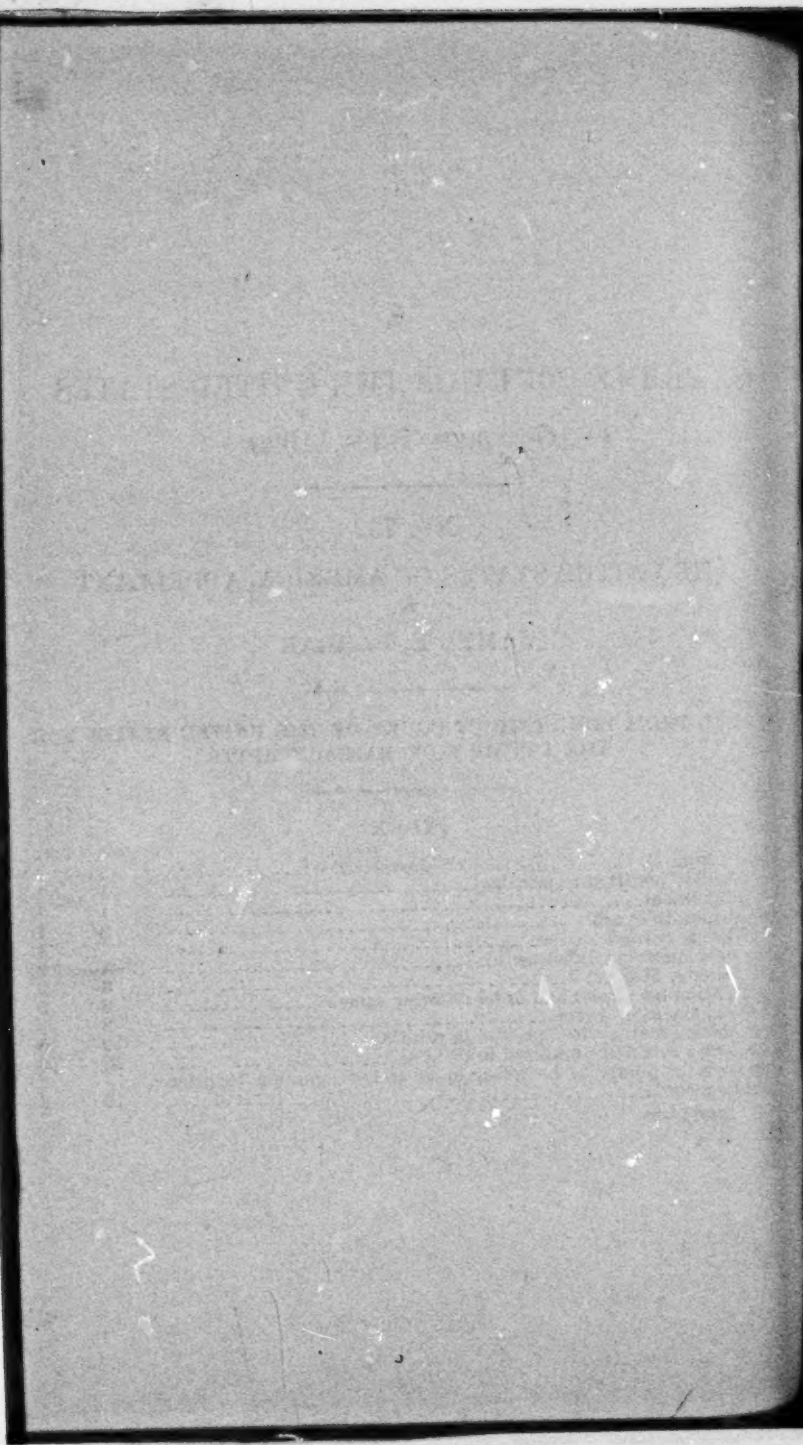
vs.

JAMES E. FARRAR

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

INDEX

	Original	Print
Record from D. C. U. S., District of Massachusetts	1	1
Caption [omitted in printing]	1	1
Indictment	1	1
Motion to quash	2	1
Minute entries	2	1
Order quashing indictment	2-A	2
Opinion, Morton, J.	3	2
Petition for appeal and order allowing same	8	5
Assignment of errors	8	5
Citation and service [omitted in printing]	10	6
Clerk's certificate [omitted in printing]	12	6
Statement of points to be relied upon and designation to print entire record	13	6



1 [Caption omitted.]

In United States District Court, District of Massachusetts

No. 9390, Criminal Docket

UNITED STATES OF AMERICA, BY INDICTMENT

v.

JAMES E. FARRAR

Indictment

The jurors for the United States of America, within and for the district of Massachusetts, upon their oath, present that James E. Farrar, of Watertown, in the district of Massachusetts, on or about the twenty-eighth day of September in the year one thousand nine hundred and twenty-nine, at Cambridge in said district, did unlawfully and knowingly purchase from one Frank Rotondo of Medford in said district intoxicating liquor containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes as defined in the act of Congress of October 28, 1919, commonly known as the national prohibition act, to wit, two pints, more or less, thereof.

This indictment is presented by the grand jury at the present December Term of this Court, A. D. 1929.

2 In United States District Court

Motion to Quash Indictment

Filed February 13, 1930

Now comes the defendant in the above entitled cause, and moves this honorable court that the indictment returned against him by the grand jury, to the effect that he unlawfully and knowingly purchased intoxicating liquor from one Frank Rotondo, be quashed on the ground that said indictment, the allegations of which the defendant does not admit to be true, does not constitute an offense indictable under the laws of the United States.

By his attorney.

JAMES A. CRESSWELL.

In United States District Court

Minute entries

On the 24th day of said February, said cause is set down for hearing on the aforementioned motion to quash indictment and is

fully heard by the court, the Honorable James M. Morton, jr., district judge, sitting, and on the 7th day of March, A. D. 1930, an opinion of the court is announced.

Thereupon, to wit, March 7, 1930, it is considered by the court, the Honorable James M. Morton, jr., district judge, sitting as aforesaid, that the indictment in this cause be and the same is hereby quashed.

2A In United States District Court, District of Massachusetts

Criminal No. 9390

UNITED STATES OF AMERICA

vs.

JAMES E. FARRAR

Order quashing indictment, Mar. 7, 1930

MORTON, J.:

Ordered, that for reasons stated in the opinion filed herewith, this indictment is quashed.

By the court.

JAMES S. ALLEN, *Clerk.*

7 Mar., 1930. J. M. M., jr.

2B [Certificate to foregoing paper omitted in printing.]

3 In United States District Court

Opinion, March 7, 1930

MORTON J.: This indictment charges in the simplest and most direct language that the defendant committed a crime by knowingly and unlawfully purchasing two pints of intoxicating liquor from one Rotondo. There is no charge of illegal possession. The defendant has moved to quash on the ground that the act charged is not criminal.

The case presents a question of statutory construction, whether the purchase of liquor is criminal under the national prohibition act. The basic prohibitory section, around which the act is built does not prohibit purchases. "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act," etc. (section 3.) The Government relies on section 6, "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner to do so," etc. The defendant contends that this sec-

ion, which is one of a group relating to permittees and privileged persons, applies only to them, and does not touch purchases by the general public.

The case is said to be the first of its kind under the present statute, and the question to be new. It is true that there appears to be no direct decision whether the buyer of liquor is guilty of an offense under the national prohibition act. Two circuit courts of appeal, however, have referred to the question, and stated explicitly that in their opinion the purchase of liquor by the general public is not criminal.

"We concede at once that merely as buyer he was not a party to the scheme in any criminal sense." L. Hand, J., Becher vs. U. S., 5 F. 2nd 45 at 50, C. C. A. 2nd.

"It is conceded that under the eighteenth amendment and the Volste'd Act passed to carry it into effect the purchase of liquor is not made an offense. It follows that the purchase as such does not subject the buyer to punishment. This is perfectly clear from the act itself. Not only did Congress carefully exclude the purchaser from the penal provisions of the act as originally passed, but has taken no step to extend its provisions to the purchaser in the ten years of legislation which have since intervened. That the intention and purpose of Congress is in harmony with the act as drawn is thus made perfectly manifest." Thomson, J., Norris vs. U. S., 34 F. 2nd 839 at 841.

There is also a statement by the Supreme Court, which, though less categorical, amounts to the same thing, in United States vs. Katz, 271 U. S. 354, where it is said: "Of the thirty-nine sections in Title II of the act, which deals with national prohibition, more than half, including the seven sections which precede section 10, contain provisions authorizing or regulating the manufacture, sale, transportation, or use of intoxicating liquor for nonbeverage purposes. These provisions, read together, clearly indicate a statutory plan or scheme to regulate the disposition of alcoholic liquor not prohibited by the eighteenth amendment, in such manner as to minimize the danger of its diversion from authorized or permitted uses to beverage purposes. These provisions plainly relate to those persons who are authorized to sell, transport, use, or possess intoxicating liquors under the eighteenth amendment and the provision of section 3 of the act, already quoted." Stone, J., p. 361–362. The sections thus discussed are copied in a footnote to the opinion; they include section 6 on which the Government relies in this case. The last sentence above quoted is an explicit dictum that section 6 relates only to permittees. In the Katz case general words which, taken literally, included the defendant, "*No person* (italics mine) shall manufacture, purchase for sale, sell," etc. (section 10) were held to be cut down by the context and the tenor of the act as a whole, and to apply only to permittees. The language of section 6 is similar: "No one shall," etc.; both sections relate to the

same subject, control of permitted liquor. The decision comes close to being a decisive authority against the Government's contention.

Even if my own opinion was to the contrary, which it is not, I should hardly feel at liberty to disregard such weighty expressions, especially when the same view seems to have been uniformly held by prosecuting officers, and by the public at large, for more than ten years, and with respect to a statute intimately touching everyday life. The popular construction of such a statute over a long period of time was held to be highly significant as to its true meaning in State vs. Teahan, 50 Conn. 92, and State vs. Rand, 51 N. H. 361. In the latter case it was said, "That such a prosecution is unprecedented in this State, shows very strongly what has been understood to be the law upon the subject." Smith, J. Moreover, the statute under consideration belongs to a class of which many examples are to be found in our legislation. While the language of them differs, all follow similar lines. All have been similarly construed. In Lott vs. United States, 205 F. R. 28, C. C. A. 9th, the court said, "It is uniformly held
6 that statutes prohibiting the sale of intoxicating liquors are directed against the act of selling only, and that the offense is committed only by the vendor or some one who aids him in selling, and that the purchaser and those who aid him in the purchase are not guilty of aiding or abetting in the commission of the offense." Gilbert, J., at p. 29. "We know of no law that prohibits the purchase of liquor." Owen, J. Reed vs. State, 24 L. R. A. ns 268 at 274.

It seems clear that if Congress had intended to introduce such a revolutionary change in existing methods of dealing with the liquor problem as making the ordinary buyer criminally liable, it would have said so in no uncertain terms (see Shaw, C. J., Com. vs. Willard, 22 Pick. 476, 479, and Norris vs. U. S., ubi supra); and it would have expressly prescribed the penalties for buying, as it did for selling, in far more definite language than that on which the Government here relies, viz.: "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined," (section 29), etc., which appears to relate to permittees. There are strong reasons why permittees should be penalized for abuse of the privileges granted them.

As I construe the indictment it does not charge the defendant with aiding and abetting a sale of liquor. Even if it does, no crime would be charged. It has been repeatedly held that the buyer was not, ipso facto, an aider and abetter of the seller; and the Government counsel conceded at the argument that no other relation between the defendant and Rotondo existed in this case. (See Norris vs. U. S. supra; Lott vs. U. S., 46 L. R. A. ns 409, note citing authorities; State vs. Teahan, supra; State vs. Cullins, 24 L. R. A. 212.) The act of April 30, 1789, as amended (18 U. S. C. A. sec. 251) requires both concealment and failure to disclose. Under it some affirmative

7 act toward the concealment of the felony is necessary. Mere silence after knowledge of the commission of the crime is not sufficient. The allegations of the indictment do not bring it within this statute. (See Robinson vs. State, 57 Ind. 113; Com. vs. Tuckerman, 10 Gray. 173.)

Indictment quashed.

8 In United States District Court

Petition for Appeal from Order Quashing Indictment and Order Allowing Same

Filed March 8, 1930

To the JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS:

In the case hereinabove named the United States of America, deeming the court to be in error in the order and decree made and entered herein on the seventh day of March, in the year one thousand nine hundred and thirty, hereby appeals from said order and decree, and it therefore prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order and decree was made, after due authentication, may be sent to the United States Supreme Court.

UNITED STATES OF AMERICA
(By its attorneys),
FREDERICK H. TARR,
United States Attorney,
By ELIHU D. STONE,
Assistant United States Attorney.

Assented to:

JAMES A. CRESSWELL,
Attorney for Defendant.

8 March, 1930. Appeal allowed.

JAMES M. MORTON, Jr.,
U. S. District Judge.

In United States District Court

Assignment of errors

Filed March 8, 1930

And now on this 8th day of March, in the year one thousand nine hundred and thirty, comes the United States of America and in connection with its appeal makes the following assignment of errors, namely:

1. The court erred in allowing the motion of the defendant in the above entitled case.

2. The court erred in decreeing that the indictment in said case be quashed.

9 3. The court erred in ruling that the provision contained in section 6, Title II, of the national prohibition act, which is in part as follows, to wit: "No one shall * * * purchase * * * any liquor without first obtaining a permit from the commissioner so to do," etc., has no application to the case at bar.

4. The court erred in ruling that said provision of said section 6 is limited in its application to persons eligible to be permittees under said national prohibtion act.

5. The court erred in ruling that said provision of section 6 is limited in its application to permittees.

6. The court erred in ruling that said provision of section 6 does not relate to the general public.

7. The court erred in ruling that the provision contained in section 29, Title II, of said national prohibition act to the effect that any one who "violates the provisions of this title, for which offense a special penalty is not prescribed, shall be fined," etc., relates to permittees.

8. The court erred in ruling that the penal provisions of section 29, Title II, of said national prohibition act have no application to the case at bar.

UNITED STATES OF AMERICA
(By its attorneys),
FREDERICK H. TARR,
United States Attorney,
By HAVEN PARKER,
Assistant United States Attorney.

10 [Citation in usual form, showing service on James A. Creswell, omitted in printing.]

12 [Clerk's certificate to foregoing transcript omitted in printing.]

13 In Supreme Court of the United States

Statement of points upon which the appellant relies and designation to print entire record

Filed Mar. 13, 1930.

STATEMENT

I

Pursuant to Rule 13 of this court, appellant specifies the following points upon which it intends to rely in the above-entitled cause:

A. It is an offense under the national prohibition act to purchase intoxicating liquor except as authorized by that act.

B. The provision of section 6, Title II, of the national prohibition act, that "No person shall * * * purchase * * * any liquor without first obtaining a permit from the commissioner so to do," is not confined to persons to whom permits to purchase liquor may lawfully issue, but applies to all persons.

C. The provision of section 29 of Title II, imposing a penalty upon "Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed," applies to all persons who purchase liquor, except as authorized by the act.

II

The entire record as filed should be printed.

WILLIAM D. MITCHELL,
Attorney General.
G. A. YOUNGQUIST,
Assistant Attorney General.
JOHN J. BYRNE,
Attorney.

MARCH, 1930.

(File endorsement omitted.)
Filed Mar. 18, 1930.

[Indorsement on cover:] File No. 34863. Massachusetts D. C., U. S. Term No. 732. The United States of America, appellant, vs. James E. Farrar. Filed March 12, 1930. File No. 34863.

U. S. GOVERNMENT PRINTING OFFICE, 1930.

FILE COPY

No. 732

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES E. FARRAR

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT OF JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES E. FARRAR

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, appellant submits herewith its statement showing the basis of this Court's jurisdiction in the above-entitled cause:

A

STATUTES

The statutory jurisdiction of this Court to review by direct appeal the judgment here complained of is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

B

DATES OF JUDGMENT AND APPLICATION FOR APPEAL

The judgment of the District Court was entered March 7, 1930. (R. 2.[1]) The application for appeal was made March 8, 1930, and allowed the same day. (R. 8.) The case was docketed in this Court March 12, 1930.

NATURE OF THE CASE

The indictment charged that the defendant had unlawfully and knowingly purchased intoxicating liquor containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes as defined in the National Prohibition Act. (R. 1.) A motion to quash the indictment was sustained on the grounds that the provision of Section 6, Title II, of that Act, prohibiting the purchase of liquor without a permit, applies only to persons to whom permits to purchase liquor may lawfully issue under the Act, and that the purchase of liquor is not otherwise made an offense by the National Prohibition Act. (R. 3–7.)

D

CASES SUSTAINING JURISDICTION

United States v. *Stevenson*, 215 U. S. 190, 195–196.

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[1]All references to the record are to the pages of the certified unprinted record prepared by the clerk of the District Court and on file with the clerk of this Court. The record has not yet been printed.

United States v. *Patten*, 226 U. S. 525.
United States v. *Birdsall*, 233 U. S. 223.
United States v. *Yuginovich*, 256 U. S. 450, 461.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.
G. A. YOUNGQUIST,
Assistant Attorney General.
JOHN J. BYRNE,
Attorney.

MARCH, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. 732

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, APPELLANT

v.

JAMES E. FARRAR

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	5
Specification of errors to be urged	6
Summary of argument	6
Argument:	
I. The question involved should be viewed in the light of the ultimate aim and purpose of the national prohibition act which is to prevent the use of intoxicating liquor as a beverage	8
II. The failure to include the purchase of liquor in the enumeration of acts prohibited by section 3 does not establish that Congress intended that the purchase of liquor should not be an offense	10
III. The purchase of liquor for a purpose not authorized by the act is within the terms of the prohibition of section 6	12
IV. Considerations tending to show that the purchase of liquor except as authorized by the national prohibition act is not an offense under that act	15

CITATIONS

Cases:	
Bombinski v. *State*, 183 Wis. 351	13
Corneli v. *Moore*, 257 U. S. 491	8
Donnelley v. *United States*, 276 U. S. 505	9, 14
Feinberg v. *United States*, 2 F. (2d) 955	12
Fritzel v. *United States*, 17 F. (2d) 965	10
Goldberg v. *Yellowley*, 290 Fed. 389	10
Lott v. *United States*, 205 Fed. 28	15
McCarren v. *United States*, 8 F. (2d) 118	12
Norris v. *United States*, 34 F. (2d) 839; No. 555, Oct. Term, 1929	23
Schnitzler v. *Yellowley*, 290 Fed. 849	10
Selzman v. *United States*, 268 U. S. 466	10
Singer v. *United States*, 278 Fed. 415	22
United States v. *Dodson*, 268 Fed. 397	10
United States v. *Katz*, 271 U. S. 354	23
United States v. *Kerper*, 29 F. (2d) 744	23
Vannata v. *United States*, 289 Fed. 424	22
Williams v. *United States*, 3 F. (2d) 933	12
Yudelson v. *Andrews*, 25 F. (2d) 80	9

Statutes:	Page
Comp. Stats., Nebr., 1922, sec. 3238	20
Laws of Nebraska, 1917, c. 187, sec. 2, p. 426	20
National prohibition act, c. 85, 41 Stat. 305, 308, 310, 316, Title II—	
Sec. 3 (U. S. C., title 27, sec. 12)	2
Sec. 6 (U. S. C., title 27, sec. 16)	2
Sec. 29 (U. S. C., title 27, sec. 46)	4
Sec. 32 (U. S. C., title 27, sec. 49)	12
Miscellaneous:	
Cong. Rec., vol. 55, part 6, p. 5647	17
Cong. Rec., vol. 58, part 3—	
P. 2512	20
P. 2802	21
House Report No. 91, 66th Cong., 1st sess.—	
P. 2	19
P. 7	19
Senate Report No. 151, 66th Cong., 1st sess., p. 20	18

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 732

THE UNITED STATES OF AMERICA, APPELLANT

v.

JAMES E. FARRAR

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 2) has not yet been reported.

JURISDICTION

The judgment to be reviewed was entered March 7, 1930. (R. 2.) Appeal to this Court was petitioned for and allowed on March 8, 1930. (R. 5.) The jurisdiction of this Court rests upon the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925. (See

Jurisdictional Statement of Appellant, filed March 14, 1930.)

QUESTION PRESENTED

The single question presented is whether it is an offense under the National Prohibition Act to purchase intoxicating liquor except as authorized in that Act.

STATUTES INVOLVED

Sections 3, 6, and 29, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 308, 310, 316 (U. S. C., Title 27, Secs. 12, 16, and 46) provide, so far as here important:

> SEC. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: * * *.
>
> SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person

may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided * * *.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided,* That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further,* That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. * * * Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in Section 5 hereof.

* * * * *

SEC. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. * * *

STATEMENT

The appellee was indicted in the District Court of the United States for the District of Massachusetts (R. 1) upon the charge that he—

> did unlawfully and knowingly purchase from one Frank Rotondo of Medford in said district intoxicating liquor containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes as defined in the act of Congress of October 28, 1919, commonly known as the national prohibition act, to wit, two pints, more or less, thereof.

A motion to quash the indictment on the ground that it failed to charge an offense indictable under the laws of the United States (R. 1) was sustained and the indictment quashed. (R. 2.) In an opinion simultaneously handed down the District Court gave as reasons for its action that the purchase of liquor is not included among the acts prohibited by Section 3, Title II, of the National Prohibition Act; that the prohibition of Section 6 against the purchase of liquor without a permit applies only to persons to whom permits to purchase may lawfully issue under the Act, and that the provision of Section 29 imposing a penalty for a violation of any provision of Title II for which a special penalty is not prescribed relates only to permittees.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In quashing the indictment.

(2) In holding that it is not an offense under the National Prohibition Act to purchase liquor except as authorized by that Act.

(3) In holding that the prohibition of Section 6 of Title II against the purchase of liquor without a permit applies only to those to whom permits may lawfully issue under the Act.

(4) In holding that the provision of Section 29 prescribing penalties for offenses for which a special penalty is not imposed relates only to permittees.

SUMMARY OF ARGUMENT

The question whether it is an offense under the National Prohibition Act to purchase liquor except as authorized in that Act should be viewed in the light of the ultimate aim and purpose of the Act, which is to prevent the use of intoxicating liquor as a beverage.

The fact that the purchase of liquor is not included in the enumeration of acts made offenses by Section 3 of Title II does not establish that Congress did not intend to make the purchase of liquor an offense. The Act defines many offenses other than those enumerated in Section 3.

The purchase of liquor for a purpose not authorized by the Act comes within the terms of the prohibition of Section 6 of Title II that "No one

shall * * * purchase * * * any liquor without first obtaining a permit from the commissioner so to do * * *." To hold that that provision applies only to authorized purchases of liquor would give the statute the effect of making the purchase of liquor without a permit an offense if the liquor was purchased for a lawful purpose, but not an offense if the liquor was purchased for a proscribed purpose, such as for use as a beverage. Such a construction would appear to run counter to the provision of Section 3, that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

That a special penalty is not imposed by Title II for the unauthorized purchase of liquor is no indication that Congress did not intend to make that act an offense. The only penalties specially imposed by that title are for the maintenance of a "common nuisance" and for the illegal manufacture and sale of liquor. The penalties for all other violations of Title II are prescribed by the provision of Section 29 that "Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined * * *." That provision is clearly not confined to violations by permittees.

In order to assist the Court in reaching a conclusion upon the question involved in this case its

attention is directed also to certain considerations tending to show that the unauthorized purchase of liquor may not be an offense under the National Prohibition Act, and the Government submits the question for the decision of this Court.

ARGUMENT

I

THE QUESTION INVOLVED SHOULD BE VIEWED IN THE LIGHT OF THE ULTIMATE AIM AND PURPOSE OF THE NATIONAL PROHIBITION ACT WHICH IS TO PREVENT THE USE OF INTOXICATING LIQUOR AS A BEVERAGE

In the consideration of the question involved in this case it should be borne in mind that the dominant purpose of the National Prohibition Act is the prevention of the consumption of intoxicating liquor as a beverage. That purpose unmistakably appears from the declaration of Section 3, Title II, that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." It has, moreover, been repeatedly recognized and given effect by the courts. Thus, in *Corneli* v. *Moore*, 257 U. S. 491, this Court, in passing upon contentions of the appellants that, having acquired ownership of liquor in bonded warehouses by the purchase of warehouse receipts, they had the right to pay the required tax and remove the liquor to their homes, said (p. 496):

> To accept them [the appellants' contentions] would defeat the purpose of the act

> and its achievement of the mandate of the Constitution. * * * And, as we have said, the act declares (Sec. 3) that all of its provisions shall be liberally construed "to the end" to quote its words, "that the use of intoxicating liquor as a beverage may be prevented." The method of appellants, we think, tended to the opposite effect; tended to the use of liquor as a beverage—not its prevention.

In *Donnelley* v. *United States,* 276 U. S. 505, where the question was whether the intentional failure by a Federal prohibition director to report to the United States Attorney a violation of the National Prohibition Act of which he had actual knowledge was an offense under Section 2, Title II, of that Act, the defendant contended in this Court that the requirement that such a report should be made was directory only; that Congress did not intend that a failure to report should be a punishable offense, and that the statute should be strictly construed in favor of the accused. Regarding the contention last mentioned, this Court, in an opinion affirming the conviction, said (p. 512):

> Section 3 forbids a narrow or strict construction of the Act, and directs that all its provisions "shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

And in *Yudelson* v. *Andrews,* 25 F. (2d) 80, the Circuit Court of Appeals for the Third Circuit similarly declared (p. 82):

> A reading of the National Prohibition Act reveals that its one purpose is to stop the use of intoxicating liquor as a beverage. All of its provisions are devoted to ways and means to attain that end.

See also, *Selzman* v. *United States*, 268 U. S. 466, 468; *United States* v. *Dodson* (S. D. Cal.), 268 Fed. 397, 400; *Goldberg* v. *Yellowley* (E. D. N. Y.), 290 Fed. 389, 390; *Schnitzler* v. *Yellowley* (E. D. N. Y.), 290 Fed. 849, 853; *Fritzel* v. *United States* (C. C. A. 7th), 17 F. (2d) 965, 967.

That the sale of intoxicating liquor except as authorized therein is made an offense by the National Prohibition Act can not be disputed. There can be no sale without a corresponding purchase. To hold that the unauthorized purchase of liquor is not an offense under the Act is to say that Congress has refrained from adopting a means equally effective as the prohibition against sale to achieve the underlying object of the Act. We submit that such a purpose can not be ascribed to Congress unless the Act contains no provision which, when liberally construed as required by Section 3, shows an intent to prohibit and punish such a purchase of liquor.

II

THE FAILURE TO INCLUDE THE PURCHASE OF LIQUOR IN THE ENUMERATION OF ACTS PROHIBITED BY SECTION 3 DOES NOT ESTABLISH THAT CONGRESS INTENDED THAT THE PURCHASE OF LIQUOR SHOULD NOT BE AN OFFENSE

The first ground upon which the District Court based its decision that the indictment in this case

fails to charge an offense under the National Prohibition Act is that the purchase of liquor is not included in the enumeration of acts prohibited by Section 3. But there are many acts and omissions, some relating to transactions authorized under regulations and permits and some to transactions wholly prohibited, which, though not included in that enumeration, are unquestionably made offenses by the National Prohibition Act and punishable under Section 29. Among them are the failure of investigating officers to report violations to the United States Attorneys (Section 2); the use or disposition of intoxicating liquor by manufacturers of denatured alcohol, medicinal or toilet preparations, flavoring extracts, etc., otherwise than as an ingredient of such articles (Section 4); the sale by any person of any of such articles for beverage purposes (Section 4); the prescribing of liquor by anyone not a physician holding a permit to do so, as well as the prescribing by such a physician of liquor otherwise than in good faith as a medicine (Section 7); the failure to keep a record of liquor manufactured, purchased for sale, sold, or transported (Section 10); the failure of the manufacturer of liquor to attach to each container thereof a prescribed label (Section 12); the advertising of where or from whom liquor may be obtained (Section 17); the maintenance of a "common nuisance" (Section 21), and the possession of property designed for the manufacture of liquor in-

tended for illegal use (Section 25). It does not necessarily follow, therefore, that the omission from what the court below calls "the basic prohibitory section" of a prohibition against the purchase of liquor indicates that Congress did not intend to make that act an offense.

III

THE PURCHASE OF LIQUOR FOR A PURPOSE NOT AUTHORIZED BY THE ACT IS WITHIN THE TERMS OF THE PROHIBITION OF SECTION 6

In opposing the motion to quash the Government relied in the court below upon the provision of Section 6, that "No one shall * * * purchase * * * any liquor without first obtaining a permit from the commissioner so to do * * *." The indictment did not, it is true, allege that the liquor was purchased without a permit. But the possession of a permit authorizing such purchase was a matter of defense which it was unnecessary to negative in the indictment. Section 32, Title II; *Williams* v. *United States* (C. C. A. 6th), 3 F. (2d) 933, 934; *Feinberg* v. *United States* (C. C. A. 8th), 2 F. (2d) 955–956; *McCarren* v. *United States* (C. C. A. 7th), 8 F. (2d) 113, 114. The above provision of Section 6, that *no person* shall purchase liquor without obtaining a permit, taken in the plain, ordinary sense of its language, is manifestly broad enough to embrace *all persons,* and, therefore, to include the appellee. The District Court failed, however, to give that provision literal effect,

but ruled that it is confined in its application to persons to whom permits may issue. Such a construction has the anomalous effect of making the purchase of liquor without a permit an offense under the statute if the liquor is purchased for lawful purposes, but not an offense if the liquor is purchased to be disposed of illegally. It would result therefrom, for example, that a druggist who purchased whiskey for the purpose of dispensing it upon physicians' prescriptions, or a manufacturer of medicinal preparations or toilet articles who purchased distilled spirits for use in his business, would be subject to prosecution under Section 6 if he purchased such liquor without a permit; whereas if the same druggist or manufacturer purchased liquor without a permit for his own beverage consumption or for sale for beverage use by others, he would be exempt from prosecution under that statute. This would appear to run counter to the command of Section 3 that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

In *Bombinski* v. *State,* 183 Wis. 351, where the plaintiff in error had been convicted of the purchase of liquor in violation of Subdivision 7, Section 1543, Wisconsin Statutes, 1921, which was substantially identical with the provision of Section 6 here involved, the Supreme Court of Wisconsin sustained the conviction upon evidence which

showed that the plaintiff in error had purchased illegally manufactured liquor.

The further holding of the District Court that had Congress intended to make the purchase of liquor by the ordinary buyer a criminal offense it would have expressly prescribed a penalty for buying, as it did for selling, and that the provision of Section 29 upon which the Government relied as prescribing the punishment for the purchase of liquor for unauthorized purposes "appears to relate to permittees," is plainly unsound. There is no more reason for assuming that the failure to provide a special penalty for the purchase of liquor shows the intent of Congress not to make that act an offense than there is for assuming that the unauthorized transportation, importation, exportation and possession of liquor are not offenses because no special penalties are provided therefor. The only penalties specially imposed by Title II are those for maintaining a "common nuisance" (Section 21), and for the illegal manufacture and sale of liquor (Section 29). The penalties for all other violations of Title II are prescribed by the provision of Section 29: "Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined," etc. See *Donnelley* v. *United States, supra,* pp. 513–515. Manifestly, that provision is not confined to violations by permittees.

IV

CONSIDERATIONS TENDING TO SHOW THAT THE PURCHASE OF LIQUOR EXCEPT AS AUTHORIZED BY THE NATIONAL PROHIBITION ACT IS NOT AN OFFENSE UNDER THAT ACT

In the points heretofore discussed we have endeavored to present the arguments in support of the indictment. On the other hand, we feel it our duty to the Court to call attention to the following matters tending to show that an unauthorized purchase of liquor may not be a crime.

1. In *Lott* v. *United States* (C. C. A. 9th), 205 Fed. 28, decided in 1913, the plaintiff in error, an Indian, sought review of his conviction in Alaska of having solicited and incited another to sell him liquor. The purchase of liquor, whether by an Indian or other person, was not an offense in that territory, and the indictment was based on the theory that, in soliciting and inciting the commission of the crime of selling, Lott had committed an offense under the common law. The Circuit Court of Appeals set aside the conviction. After citing many State court decisions as indicating that it was the general, if not universal, policy of the liquor laws of the States not to make the purchase of liquor an offense, the court declared that unless Congress intended to make the purchase of liquor unlawful, the plaintiff in error's solicitation of another to sell liquor to him could not be regarded as an offense. As to the intent of Congress it said (p. 31):

> The meaning of the act should be found in the light of the anterior legislation on

the same subject, legislation not of Congress only, but of the states, and the decisions of the courts, and the general understanding as to the meaning and scope of similar statutes, resulting, in a sense, in a common law of the states on that subject. Section 142 of the Criminal Code of Alaska, as it was originally enacted, made the act of selling intoxicating liquor to Indians a misdemeanor only. In February, 1909 (Act Feb. 6, 1909, c. 80, Sec. 9, 35 Stat. 603), it was so amended as to increase the severity of the punishment. The amendment did not declare the violation of the section to be a felony, but such is the effect of section 335 of the Criminal Code of 1910. Congress must have been aware of the universal ruling of the courts that under laws prohibiting the sale of intoxicating liquors the purchaser committed no offense. We are not justified in assuming that, in so amending the law and increasing the punishment for its violation, it was the intention to make criminal, and subject to punishment as a crime, the act of purchasing or attempting to purchase intoxicating liquors, which theretofore had been innocent acts. If such had been the intention of Congress, it is but reasonable to presume that it would have been expressed in such clear terms as to admit of no doubt. In the absence of such express legislation, we are authorized to presume that Congress deemed it of greater advantage to the Government in enforcing the law to leave the Indian who might succeed in purchasing

liquor in Alaska free to testify in the courts against the seller thereof, than to punish the Indian for purchasing, or offering to purchase, the same.

2. On August 1, 1917, when the joint resolution proposing the Eighteenth Amendment for adoption by the States was under consideration in the Senate, Senator Hardwick offered as an amendment to Section 1 that the words "purchase, use," be inserted after the word "sale," so that that section, as thus amended, would prohibit the "manufacture, sale, *purchase, use,* or transportation of intoxicating liquors," etc.

After considerable debate the following occurred (Cong. Rec., Vol. 55, Part 6, p. 5647):

> The PRESIDENT pro tempore. The pending question is on the amendment of the Senator from Georgia (Mr. Hardwick).
>
> Mr. SHEPPARD. Mr. President, I hope the amendment of the Senator from Georgia will be voted down. It is not necessary to the accomplishment of the purposes of the resolution. We should employ in the organic law as few terms as possible in order to reach the purpose we have in mind.
>
> The amendment now framed prohibits the manufacture of intoxicating liquors within the limits of the Republic and the importation of such liquors into the Republic. It destroys the traffic in intoxicating liquors. With that object accomplished, use will cease and purchase will cease, and therefore it is unnecessary to have specific provisions

> as to purchase and use embodied in the amendment. I trust that the amendment of the Senator from Georgia will be rejected.
>
> Mr. HARDWICK. Does the Senator state any specific objection to my amendment?
>
> Mr. SHEPPARD. I say it is unnecessary, and I do not want to put any unnecessary language in the constitutional amendment.

Senator Hardwick's amendment having been put to a vote, it was defeated sixty-two to four (p. 5648).

The fact, however, that a prohibition against the purchase of liquor for beverage purposes was intentionally omitted from the Eighteenth Amendment does not necessarily mean that such a purchase is not made unlawful by the National Prohibition Act. Many acts not mentioned in the Amendment, including the possession of intoxicating liquor, the maintenance of a common nuisance, and the advertising of liquor, are made offenses by that Act.

3. Dealing with the permissive features of H. R. 6810, 66th Congress, which became the National Prohibition Act, the Senate Judiciary Committee in its report on that bill said (S. Rep. No. 151, p. 20, 66th Cong., 1st Sess.):

> The provisions requiring those who sell or manufacture liquor for nonbeverage purposes to secure a permit is a continuation of the system now enforced by the Federal authorities. It is the most effective means to insure obedience to the law and prevents the

> diversion of liquor for illegal purposes. It is a slight burden on the law-abiding citizens who are dealing in liquor for legal purposes.

Upon the same subject the House Judiciary Committee in its report on H. R. 6810 said (H. Rep. No. 91, p. 2, 66th Cong., 1st Sess.):

> Title 2, to enforce prohibition under the eighteenth amendment to the Constitution, contains substantially the same features as title 1 and in addition a system of permits such as is now in force under regulations of the Revenue Department, Treasury Decision 2788, and in the various prohibition codes. These permits are designed to prevent diversion of liquor from legal to illegitimate uses. This system greatly lessens prosecution by making it difficult for persons to obtain liquor except for legitimate purposes. In addition to the permit system, which is also provided for in title 3 (the industrial-alcohol section) the act carries a number of the more essential penal provisions of the ordinary prohibition codes, such as those against advertising liquor.

With reference to Title II in general it was said on page 7 of H. Rep. No. 91:

> Title 2 for the enforcement of the eighteenth amendment has in it no new or experimental features: Every provision in it has precedents in State or Federal legislation. Many States have provisions in their laws that are much more drastic than any contained in this bill.

4. When discussing the origin of the bill on the floor of the House, Mr. Volstead, chairman of the Judiciary Committee, observed (Cong. Rec., Vol. 58, Part 3, p. 2512):

> No one should draw a bill of this kind without making use of legislation that has been tried out in other jurisdictions. Anyone who would attempt to originate a bill without doing that would be exceedingly foolish. The bill was largely modeled on the Ohio law. I have the Ohio statute, and you will find a large number of these provisions in that statute. And, by the way, the Ohio statute is much more drastic than the provisions of this bill. I have it here so that I can satisfy anyone who is curious on the subject. Every State, I believe, that has a prohibition law has the essential features of this bill, including Iowa, Oregon, Kansas, North Dakota, South Dakota, Minnesota, Nebraska, Idaho, Alaska, Washington, and I might mention a number of others.

An examination of the prohibition laws here referred to by Mr. Volstead shows that only in Nebraska was the purchase of beverage liquor an offense. There the "purchase" of intoxicating liquor except for medicinal, mechanical, scientific, or sacramental purposes was included among the acts declared unlawful. (Laws of Nebraska, 1917, c. 187, Sec. 2, p. 426; Comp. Stats., Neb., 1922, Sec. 3238.)

5. As introduced in the House, H. R. 6810 provided in that part which is now the second paragraph of Section 3:

> Liquor for nonbeverage purposes and wine for sacramental purposes may be purchased, sold, transported, and used as herein provided.

Mr. Volstead proposed to amend the foregoing provision by striking out all after the word " be" and inserting "manufactured, sold, bartered, given away, transported, imported, exported, delivered, furnished, received, possessed, and used, but only as herein provided and permits may be issued therefor." The record shows the following to have thereupon occurred (Cong. Rec., Vol. 58, Part 3, p. 2802):

> Mr. GARD. Mr. Chairman, I move to amend by including the word "purchased."
>
> Mr. JOHNSON of Kentucky. I desire to offer a perfecting amendment.
>
> Mr. GARD. After the word "manufactured," in what came from the chairman of the committee—I ask for the attention of the chairman of the committee—is it not the purpose of the gentleman also to include the word "purchased"? The gentleman struck out the language after "may be" and inserted the word "manufactured" and other words. Did not the gentleman also intend to include the word "purchased"?
>
> Mr. VOLSTEAD. There is no prohibition expressly against purchase in the first part of the section, and it is not necessary.
>
> The CHAIRMAN. The gentleman from Ohio offers an amendment, which the Clerk will report.

The Clerk read as follows:

After the word "manufactured" insert the word "purchased."

Mr. VOLSTEAD. I have no objection.

The question was taken, and the amendment was agreed to.

6. Section 32, Title II, of the National Prohibition, provides that "It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser." This apparently was intended to apply only to charges of sale and to obviate the necessity of naming the person to whom the sale was made. It can not have application to other offenses, such as possession, transportation, etc., nor of course can it have application to a charge of purchase if purchase is a crime.

7. From the passage of the National Prohibition Act down to the time the indictment in this case was submitted to the grand jury, a period of approximately ten years, the National Prohibition Act was construed by the administrative departments charged with its enforcement as not making the purchase of liquor an offense. The reports fail to disclose any other case in which such a charge was brought.

8. In the following cases courts have said *obiter* that the purchase of liquor is not an offense:

Singer v. *United States* (C. C. A. 3d), 278 Fed. 415, 419.

Vannata v. *United States* (C. C. A. 2d), 289 Fed. 424, 428.

United States v. *Kerper* (E. D. Pa.), 29 F. (2d) 744, 745.

Norris v. *United States* (C. C. A. 3d), 34 F. (2d) 839, 841, pending in this Court on writ of certiorari (No. 555, Oct. T., 1929).

9. In *United States* v. *Katz*, 271 U. S. 354, where the question was whether the defendants in error came within the effect of the prohibition of Section 10, Title II, of the National Prohibition Act, that "No person shall * * * sell * * * any liquor without making at the time a permanent record thereof," this Court held that Section 10 is one of a group of sections, including Section 6, which apply only to those dealing in liquor for purposes authorized by the Act.

As the application of Section 6 was not directly involved in the *Katz case*, the statement of this Court therein with reference to that section is not decisive of the question in the instant case.

CONCLUSION

Upon the foregoing discussion the Government submits the question here involved for the decision of this Court.

Respectfully submitted.

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APRIL, 1930.

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TABLE OF CONTENTS

	PAGE
Statement of the Case	1
The Question at Issue	3
Argument	4
Summary	21

INDEX OF CASES

Bailey v. Drexell Furniture Co., 259 U. S. 23	12
Blake v. National City Bank, 23 Wall. 307	12
Butterfield v. Stranahan, 192 U. S. 470	13
Caldron v. Atlas Steamship Co., 170 U. S. 272	12
Cohens v. Virginia, 6 Wheat 264	17
Danigor v. Cooley, 248 U. S. 319	12
DeGaney v. Lederer, 250 U. S. 376	12
Everard Breweries v. Day, 265 U. S. 543	10
Ex Parte Webb, 225 U. S. 663	20
Hahn v. U. S., 107 U. S. 402	17
Katz v. U. S., 271 U. S. 354	3, 10
McKee v. U. S., 164 U. S. 287	12
Pettibone v. U. S., 148 U. S. 197	2
Sarlls v. U. S., 152 U. S. 570	19
Seinge v. U. S., C. C. A. N. Y. 278 Fed. 415	18
Standard Oil Co. v. U. S., 221 U. S. 1	12
State v. Busick, 90 Ore. 466	18
U. S. v. Alger, 152 U. S. 384	17
U. S. v. Baltimore & O. S. W. R. Co., 222 U. S. 8	12
U. S. v. Birdsall, 233 U. S. 223	3
U. S. v. Colgate, 250 U. S. 300	3
U. S. v. George, 228 U. S. 14	19
U. S. v. Katz, 15 Fed. (2d) 528	5
U. S. v. Katz, 271 U. S. 362	3
U. S. v. Lexington Mill & Elev. Co., 232 U. S. 399	12

PAGE

U. S. v. Minn., 270 U. S. 181 17
U. S. v. Nixon, 235 U. S. 231 2
U. S. v. Reese, 92 U. S. 214 20
U. S. v. Schrader, 252 U. S. 85 3
U. S. v. Standard Brewery, 251 U. S. 210 12
U. S. v. Trans Missouri Freight Asso., 166 U. S. 290 12
U. S. v. United Verde Copper Co., 196 U. S. 207 . 19
U. S. v. Wilterberger, 5 Wheat. 96 20
U. S. v. Yuginovich, 256 U. S. 450 3
Waite v. Macy, 246 U. S. 606 19
Washington Market v. Huffman, 101 U. S. 112 . . 12
Williams v. U. S., 168 U. S. 382 2

AUTHORITIES

Blakemore on Prohibition 18
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Nelson Fed. Liquor Laws, 1930 18
Textwriters upon Prohibition 7
Wayne B. Wheeler, Fed. and State Laws . . . 18

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 732.

UNITED STATES OF AMERICA,
APPELLANT,

v.

JAMES E. FARRAR,
DEFENDANT, APPELLEE.

BRIEF FOR THE APPELLEE.

I.

CASE STATED.

This is an appeal by the United States under the Criminal Appeals Act of March 2, 1907, ch. 2564, 34 Stat. at L. 1246, U. S. C. Title 18, sec. 682 and sec. 238 of the Judicial Code as amended, from a judgment of the District Court of the United States for the District of Massachusetts quashing an indictment against James E. Farrar in which he was charged with the purchase of intoxicating liquor as defined by the National Prohibition Act.

The indictment was returned February 7, 1930, and is No. 9390 of the criminal docket. Motion to quash was filed February 13, 1930, upon the ground that the indictment, as appears upon page 1 of the record, sets forth no offence under the laws of the United States. The opinion of the

Court quashing the indictment was handed down March 7, 1930, and appears upon pages 2, 3 and 4 of the record.

The indictment charges in substance that the defendant did "unlawfully and knowingly purchase from one Frank Rotondo of Medford in said district intoxicating liquor containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes as defined in the act of Congress of October 28, 1919, commonly known as the national prohibition act, to wit, two pints, more or less, thereof."

The Criminal Appeals Act, supra, provides for an appeal "from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or *construction of the statute upon which the indictment is founded.*"

It should be noted in passing, that the indictment does not plead any statute under which it is drawn, nor does it set forth facts bringing it within any statute, nor does it specifically allege that the purchase was in violation of the National Prohibition Act.

While it is true that the statute itself need not be pleaded, facts and circumstances must be set forth to show that an offence has been committed under some specific statute.

Pettibone v. *U. S.*, 148 U. S. 197.

U. S. v. *Nixon*, 235 U. S. 231.

Williams v. *U. S.*, 168 U. S. 382.

The United States claims that the indictment sets forth an offence under section 6 of Title II of the National Prohibition Act, which, so far as applicable here is as follows:

> "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner so to do," . .

The Government also claims that the punishment is provided for in section 29 by the provision as follows:

> "Any person violating . . the provision of this Title for which offence a special penalty is not prescribed, shall be fined for a first offence not more than five hundred dollars."

The indictment does not allege that the purchase was made without a permit, or set forth facts showing that the purchase was made without a permit, so as to identify the section under which it is claimed that a purchaser is liable to prosecution.

The question as to the interpretation, or sufficiency of the indictment was not raised in the Court below, and the question presented to the Court and passed upon by the Court was the sole question as to whether an indictment charging a defendant with the purchase of intoxicating liquor is an offence against the United States under section 6 of Title II of the National Prohibition Act.

II.

THE QUESTION AT ISSUE.

The sole question at issue before this Court is whether the United States District Court erroneously construed the statute relied upon by the United States, to wit, section 6 of Title II of the National Prohibition Act.

U. S. v. *Birdsall*, 233 U. S. 223.

U. S. v. *Colgate*, 250 U. S. 300.

U. S. v. *Schrader*, 252 U. S. 85.

U. S. v. *Yuginovich*, 256 U. S. 450.

Katz v. *U. S.*, 271 U. S. 354.

The question is not one of morals or ethics as to whether the buyer is as bad as the seller; nor is it a question as to the inconsistency of a law which punishes the seller and not the buyer, or a law that punishes a privileged class of permittees for buying without a permit and not an occasional or clandestine purchaser. The question before this Court is a simple one of statutory construction.

The Government claims squarely that the provision of section 6, Title II, "No person shall—purchase—any liquor without first obtaining a permit from the Commissioner to do so," is not confined to persons to whom permits to purchase liquor may lawfully issue, but applies to all persons. The District Court ruled that that section applied to permittees, and not to an ordinary purchaser of liquor.

III.

ARGUMENT.

1. Judge Morton held that the buyer of liquor was not guilty of an offence under the National Prohibition Act, and that section 6, relied upon by the Government, related solely to permittees.

Section 6 provides:

> "No one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the commissioner so to do," etc.

The rest of the section deals with exceptions and permits.

The Senate Judiciary Committee's report embodying its interpretation of section 6 may be found printed as a foot-note to the case of *U. S.* v. *Katz,* 271 U. S. 362, and is as follows:

> "Section 6 prohibits the sale, purchase, transportation or prescription of liquor without a permit from

the Commissioner, issued as prescribed in the section, except the purchase and use for medicinal purposes and for the treatment of alcoholism. This section also exempts sacramental wines from the provisions of the Act, except as to the requirements of section 6 for permits (save for purchase) and to the requirements of section 10 for the keeping of records."

The same section is analyzed by Judge Thompson in *U. S.* v. *Katz*, 5 Fed. (2d) at page 528.

> "Section 6 prohibits selling without first obtaining a permit and prescribes details concerning the time when permits to sell shall expire, the length of time permits to purchase shall be in force, provisions as to what the permits shall specify, and prohibits their issue to persons violating the terms of prior permits. It provides for the prescribing by the commissioner of forms of permits and applications, and empowers that official to require bonds, and provides for the review of his decision by a court of equity in the event of a refusal of an application for a permit."

The title given to section 6 in the National Prohibition Act as published in Acts of Congress, 41 Stat. at L. p. 305, H. R. 6810, October 28, 1919, and in the compilation of the laws issued by the Treasury Department relating to National Prohibition Enforcement, February, 1923, is "Permits Required."

It should be noted also that section 29, the penalty provided for any person violating the terms of his permit, is as follows:

> "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offence a special penalty is not prescribed, shall be fined for a first offence not more than five hundred dollars."

The Government relies upon the second clause of this penal provision:

> "Any person—who violates any of the provisions of this title for which offence a special penalty is not prescribed;—"

A special penalty for violation of the section is specifically prescribed, albeit it is the same penalty.

The Government relies upon the phrase "no one shall —purchase," etc., ignoring the phrase "without first obtaining a permit," and ignores the penalty for "any person violating the provisions of a permit," and claims that he may be punished under the clause for which a special penalty is not prescribed. The construction put upon section 6, and the penal provisions of section 29, is clearly untenable. The Government takes "no one shall purchase" out of its context in section 6, and finds a penalty in the omnibus clause of section 29.

Section 6 provides:

> "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit."

Section 6 punishes a person who manufactures, sells, or transports without a permit. If section 6 was not intended to punish a special class of offenders, then section 6 is superfluous as to manufacturing, selling, and transporting, because section 3 also provides for the punishment of those who manufacture, sell, and transport.

The Government calls in aid of its construction put upon section 6, the last clause of section 3, to the effect, that "all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

There are many things undoubtedly which Congress may do with the laws. It may change the rules of evidence,

the burden of proof, may write its own definitions, but it cannot delegate to the Courts the power to make laws, or add to a criminal statute what is not there. Liberal construction must stop at a point where it conflicts with the Constitution, and the fundamental principles of the criminal law.

2. THE DECISION OF THE DISTRICT COURT THAT SECTION 6 OF THE NATIONAL PROHIBITION ACT, UNDER WHICH THIS INDICTMENT WAS BROUGHT, APPLIES TO PERMITTEES ONLY, IS OBVIOUSLY CORRECT. THE LANGUAGE OF SECTION 3 READS AS FOLLOWS:

> "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

In the second paragraph of the same section, which applies specifically to "liquor for non-beverage purposes", the word "purchase" is inserted between the words "manufactured" and "sold". The second clause of section 3 provides:

> "Liquor for non-beverage purposes, and wine for sacramental purposes, may be manufactured, purchased, sold . . . but only as herein provided, and the Commissioner may, upon application, issue permits therefor."

If Congress had intended to prohibit the straight purchase of beverage liquor, we should expect to find the word "purchase" also inserted in the first paragraph, but it was not. There is no possibility that the word "purchase" was

omitted from the first paragraph by inadvertence, since the section is a short one, and the insertion of the word "purchase" in regard to non-beverage liquors is inserted in the immediately following paragraph. Congress must have had in mind "purchase", because it is mentioned in sections 4, 6, 10, 11 and 13, and in every case the purchaser is referred to in connection with a permit.

In section 4, after enumeration of the exempted articles, denatured alcohol, medicinal preparations, flavoring extracts, etc., the act provides:

> "A person who manufactures any of the articles mentioned in this section may 'purchase' and possess liquor for that purpose, but he shall secure permits to . . . 'purchase' such liquor, give the bonds, keep the records, and make the reports specified in this act as directed by the commissioner."

Section 6, dealing with the permits referred to in section 4, again mentions purchase. "No one shall manufacture, sell, 'purchase', transport or prescribe any liquor without first obtaining a permit." Again in section 6: "Permits to 'purchase' liquor shall specify the quantity and kind to be purchased, and the purpose for which it is to be used."

Again in section 10, Congress must have had in mind purchase when it provided: "No person shall manufacture," "purchase for sale," etc., without keeping a record of the liquor so purchased.

Again in section 11: "All manufacturers, and wholesale and retail druggists, required to keep as part of the records—a copy of all permits to purchase"—.

Section 13 makes it the duty of a carrier to make a record of the receipt of liquor to be transported, and it shall deliver only to persons who present a verified copy of a "permit to purchase."

A glance at section 29, dealing with punishments, is illuminating. The very first paragraph provides:

"Any person who manufactures or sells liquor in violation of this title shall for a first offence be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offence shall be fined not less than $200 or more than $2,000 and be imprisoned not less than one month nor more than five years."

The first paragraph obviously deals with violations of the law by others than permittees. It is noted that the word "purchase" does not appear in this clause.

The second clause provides:

"Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months or more than two years."

The Government finding no penalty for the alleged offence of purchasing liquor either in the first or second clause, relies upon the third, "or violates any of the provisions of this title, for which offense a special penalty is not prescribed." It might be pertinent to ask, What "provisions of this title" has the purchaser violated for which a penalty is not prescribed?

If we return to section 6, the purchaser there is a purchaser with a permit, and a special penalty is provided for the violations of the terms of the permit in the second clause of section 29.

If Congress had intended to punish the purchase of liquor, it could have done so by simply inserting the word "purchase" in the first paragraph of section 3, and pro-

vided for punishment of the purchaser in the first paragraph of section 29. The fact that the word "purchase" does not appear either in sections 3 or 29, is clear and convincing evidence that Congress never intended to make the purchaser an offender.

There is no inconsistency or contradiction in the contention that Congress intended to punish purchasers who are required to have a permit, and not those who are not required to have a permit. The former class owes a legal duty to the Government for the privilege it holds; the latter owes no duty to the Government, and runs the risk of prosecution for other offences. As the learned Judge in the Court below put it, "There are strong reasons why permittees should be penalized for the abuse of the privileges granted them."

This Court is asked to write the word "purchase" into the first paragraph of section 3, or strike out the words "without a permit" in section 6. It must do one or the other to make the purchaser an offender. To borrow a phrase used by the late Mr. Justice Sanford in *Everard Breweries* v. *Day*, 265 U. S. 543, this would be "to pass the line which circumscribes the judicial department and to tread upon legislative ground."

3. Judge Morton relies strongly upon the case of *United States* v. *Katz*, 271 U. S. 354, which is decidedly analogous to the case at bar. In that case two defendants were indicted for conspiracy to sell whiskey without making a permanent record of the sale, in violation of section 10.

Section 10 provides in substance, that no person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof, etc.

The demurrers to three indictments were sustained in the lower court, and the case came to this court under the Criminal Appeals Act.

The question before this Court was, whether the words "no person shall—sell liquor—without making at the time

a permanent record thereof" is a regulatory measure applicable only to persons authorized to deal in intoxicating liquor, or whether it was intended to apply to every criminal violator of the National Prohibition Act, even though making a single isolated sale.

This Court, in affirming the decision of the District Court sustaining the demurrers, held squarely that the words "no person" in section 10, refer to persons authorized under other provisions of the Act to carry on traffic in intoxicating liquor.

The Court placed section 6 in the same catagory with section 10, as a regulatory measure dealing with the disposition of alcoholic liquor not prohibited by the 18th Amendment in such a manner as to minimize the danger of its diversion from authorized or permitted uses to beverage purposes, when it said:

> "All the thirty-nine sections in Title II of the Act, which deal with National Prohibition, more than half, including the seven sections which precede section 10, contain provisions authorizing or regulating the manufacture, sale, transportation, or use of intoxicating liquor for nonbeverage purposes."

"These provisions read together clearly indicate a statutory plan or scheme to regulate the disposition of alcoholic liquor not prohibited by the 18th Amendment in such manner as to minimize the danger of diversion from authorized or permitted uses to beverage purposes. These provisions plainly relate to those persons who are authorized to sell, transport, or possess intoxicating liquors under the 18th Amendment and the provisions of section 3 of the Act already quoted."

In the Katz case the defendants were not permittees, and were not persons required to make a record, just as in this case the defendant was not a permittee.

IV.

The meaning of a statute is determined by the language used therein, and the subject-matter to which it relates.

U. S. v. *Trans Missouri Freight Asso.*, 166 U. S. 290.

U. S. v. *Standard Brewery*, 251 U. S. 210.

Danigor v. *Cooley*, 248 U. S. 319.

DeGaney v. *Lederer*, 250 U. S. 376.

Bailey v. *Drexell Furniture Co.*, 259 U. S. 23.

However broad and general the language may be, the Court will restrain its operation within narrower limits than its words import, if satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it, or embrace in it.

Washington Market v. *Huffman*, 101 U. S. 112.

McKee v. *U. S.*, 164 U. S. 287.

It is not admitted that there is any ambiguity here, but if there is, the character of the statute determines the construction, and a criminal statute is strictly construed, and the Court will so construe the statute as to carry out the intention of the legislature.

U. S. v. *Baltimore & O. S. W. R. Co.*, 222 U. S. 8.

Caldron v. *Atlas Steamship Co.*, 170 U. S. 272.

U. S. v. *Lexington Mill & Elev. Co.*, 232 U. S. 399.

V.

The legislative intention of an act may be ascertained by recourse to its history, the mode in which amendatory words, if any, were introduced as shown by the journals

and records, and may give such construction to the statute as will carry out the intention of Congress.

Standard Oil Co. v. *U. S.*, 221 U. S. 1.

Blake v. *National City Bank*, 23 Wall. 307.

Butterfield v. *Stranahan*, 192 U. S. 470.

The records of Congress will show that there was a proposal to insert the word "purchase" into the 18th Amendment, and it was rejected by a vote of 62 to 4, 30 not voting.

Congressional Record, 65th Congress, first session, Vol. 55, part 6, page 5645, dated August 1, 1917, the Senate had under consideration joint resolution of the Senator from Texas proposing an amendment to the Constitution.

Senator Hardwick of Georgia proposed an amendment to Article 1, section 1.

Mr. HARDWICK. Mr. President, I desire to offer the amendment which I sent to the desk, so that it may be pending.

The PRESIDING OFFICER. The Secretary will state the amendment.

The SECRETARY. On page 1, line 9, after the word "sale" it is proposed to insert "purchase, use."

Mr. HARDWICK. Mr. President, the joint resolution of the Senator from Texas proposing an amendment to the Constitution prescribes, without reading the preliminary part:

> Article—section 1. The manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited.

I have proposed by the amendment which has just been read, to amend this section so that it shall read as follows:

Manufacture, sale, purchase, use or transportation—

If the amendment I have suggested is agreed to, we will not only prohibit the manufacture, sale, transportation and importation of intoxicating liquor for beverage purposes, but also prohibit, if this article should be ratified by the requisite number of states, the purchase and use of intoxicating liquor.

It is hard for me to see why it should be made unlawful to sell an article and not equally unlawful to buy it. It is hard for me to see why, if the manufacture and sale are to be forbidden, the purchase ought not also to come under the ban of the law. It is impossible for me to understand why, if it is to be unlawful to manufacture and to sell it, to buy it and transport it, to import it or export it, it ought not also be unlawful to use it.

Mr. BORAH. Mr. President—

Mr. HARDWICK. I yield to the Senator from Idaho.

Mr. BORAH. I desire to ask the Senator if that would not accentuate rather than lessen the evils which he presented so ably to the Senate yesterday, with reference to the fundamental objections which the Senator has to the joint resolution?

Mr. NORRIS. Mr. President—

Mr. HARDWICK. I yield to the Senator from Nebraska.

Mr. NORRIS. I wish to ask the Senator if he doesn't think that it would be very difficult to secure a conviction or to secure evidence of an illegal sale if the purchase of it also were made illegal, because the witness, who as a rule is the purchaser, would be protected from answering on the ground that the answer might incriminate himself.

Mr. HARDWICK. I do not think that is true. It seems to me that evidence could be obtained without that. The people who buy very rarely give evidence anyway.

Mr. NORRIS. Never willingly, but as a rule in prosecutions for the illegal sale of liquor the purchaser is a witness, although an unwilling one.

Mr. Hardwick urged in his reply that immunity might

be given to the buyer, and added further that "it strikes me, Mr. President, it is utterly and entirely dishonest to say we will make it unlawful to sell this article and not equally unlawful to buy it."

Page 5647, the President pro tempore. "The pending question is on the amendment of the Senator from Georgia (Mr. Hardwick.)

Mr. SHEPPARD. I hope the amendment of the Senator from Georgia will be voted down. It is not necessary to the accomplishment of the purposes of the resolution. We should employ in the organic law as few terms as possible in order to reach the purpose we have in mind. I trust that the amendment of the Senator from Georgia will be rejected.

Mr. HARDWICK. Does the Senator state any specific objection to my amendment?

Mr. SHEPPARD. I say it is unnecessary, and I do not want to put any unnecessary language in the constitutional amendment.

The PRESIDENT pro tempore. The question is on the amendment of the Senator from Georgia, Mr. Hardwick, to insert the words "purchase, use" after the word "sale".

Mr. HARDWICK. I ask for the yeas and nays."

Upon roll call, page 5648 of the same volume, it appears that the amendment to insert the words "purchase, use" was defeated, yeas 4, nays 62, not voting 30.

41 Stat. at L. 305, shows that H. R. 6810, dated October 28, 1919, became the National Prohibition Act, and was enacted in pursuance of the power of Congress "to enforce this article by appropriate legislation," and the general power vested in Congress under Article 1, section 8, clause 18, to make all laws necessary for carrying out the execution of the foregoing powers.

The marginal note or heading to section 3, Title II is "Acts Prohibited when the National Prohibition in Force, Vol. 40, p. 941," reference being to the ratification of the 18th Amendment.

Section 3 of Title II defines the offences or the acts

prohibited for persons not permittees, and did not include therein *the purchaser.*

It is to be presumed that Congress, in enacting the National Prohibition law, intended to keep within the scope of its constitutional authority, and not to go outside of it.

This Court said in *U. S.* v. *Standard Brewery,* 251 U. S. at 220:

> "Furthermore, we must remember in considering an act of Congress, that a construction which might render it unconstitutional is to be avoided."

As further evidence that the National Prohibition Act did not intend to make the purchase of intoxicating liquor criminal, this Court may take judicial notice of Senate Bill 1827, introduced by the same Senator Sheppard, proponent of the joint resolution which became the 18th Amendment, September 30, 1929, title being, *"A Bill Amending the National Prohibition Act so as to Prohibit the Purchase of Intoxicating Liquors as a Beverage,"* and provides:

> "The National Prohibition Act as amended and supplemented shall be and hereby is amended by inserting the word 'purchase' between the words 'manufacture' and 'sale' in section 3 of said act, so that said section as thus amended will read as follows:
>
> "No person shall on or after the date when the 18th amendment to the Constitution of the United States goes into effect, manufacture, purchase, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act."—

VI.

Judge Morton in his opinion quashing the indictment laid stress upon the fact that it has been uniformly held by prosecuting officers, and the public at large, for more

than ten years, that the purchase of liquor was not an offence under the National Prohibition Act, and said:

"The proper construction of a statute over a long period of time was held to be highly significant as to its true meaning, citing *State* v. *Teehan*, 50 Conn. 92; *State* v. *Rand*, 51 N. H. 361."

If the meaning of a statute is open to doubt, the contemporaneous construction placed upon it when it became operative and acquiesced in by the executive, the legislature, and the courts, or those charged with its enforcement, is highly persuasive of what the law is."

Lewis's Sutherland and Statutory Construction, Vol. 2, sections 471—479.

Hahn v. *U. S.*, 107 U. S. 402.

Cohens v. *Virginia*, 6 Wheat 264.

U. S. v. *Alger*, 152 U. S. 384.

U. S. v. *Minn.*, 270 U. S. 181.

As pointed out by the opinion of the Court below, there is dicta from at least three circuits—second circuit in *Beecher* v. *U. S.*, 5 Fed. (2) 45; third circuit, *Norris* v. *U. S.* 34 Fed. (2d) 839; eighth circuit *Dickinson* v. *U. S.* 18 Fed. (2d) 887—to the effect that a sale is not punishable under the National Prohibition Act.

TEXTWRITERS UPON PROHIBITION.

It is notable that every textwriter upon the National Prohibition law for the last ten years has held that a purchaser or buyer is not guilty of any offence under the National Prohibition Act.

McFadden on Prohibition, page 294, sec. 267. "Purchaser Assumes no Liability."

"The purchaser of liquor is not criminally liable as the National Prohibition Law is against the sale of

liquor and not the purchase. Likewise, a person who assists a purchaser is not liable."

Blakemore on Prohibition, p. 151:

"Prohibition of the Volstead Act is against the sale and not the purchase of intoxicating liquor." "And the purchaser of intoxicating liquor seems to run no risk of prosecution as a purchaser, as there is no law which makes it a crime to participate in the illegal sale as a purchaser."

National and State Prohibition under the Eighteenth Amendment. Thorpe, published 1926, p. 196:

"Under the National Prohibition Act it is no crime to purchase intoxicating liquor. Congress has taken half of the transaction and labeled that as a crime."

Seinge v. *U. S.*, C. C. A. N. Y. 278 Fed. 415, Certiorari denied 272 U. S. 620.

Nelson Federal Liquor Laws, 1930, p. 326, sec. 1022, heading, PURCHASE NO OFFENSE:

"Purchase of liquor is no offence under the National Prohibition Act."

Wayne B. Wheeler Federal & State Laws relating to intoxicating liquor, 3rd Edition, p. 69:

"One employed to make a purchase of intoxicating liquor for the purpose of offering as a witness against the defendant was not an accomplice within sections 1540, 2370 L. O. L., so that convictions could be had on his uncorroborated testimony, the crime being the sale and not the purchase," citing *State* v. *Busick*, 90 Ore. 466.

In that case the Court said:

> "While it is true that a sale cannot be made without a purchaser, it is also true that under the state statute the crime is in the sale of intoxicating liquor and not in the purchase."

VII.

Not until the Farrar case has any prosecution been undertaken against a mere buyer.

Administrative necessity or supposed public policy cannot add to an Act of Congress and make conduct criminal which the law leaves untouched.

Sarlls v. *U. S.*, 152 U. S. 570.

U. S. v. *Standard Brewery*, 251 U. S. 210.

The latter case was an indictment against the defendant under the wartime prohibition act, that statute prohibiting the manufacture of intoxicating liquor. The Internal Revenue Department determined, and ruled that a beverage containing one-half of one per cent of alcohol should be regarded as intoxicating liquor within the intent of the Act. The Court said:

> "Nothing in the act permits the determination of that question to the decision of the revenue officers of the Government. While entitled to respect, as such decisions are, they cannot enlarge the meaning of a statute indicated by Congress. Administrative rulings cannot add to the terms of an Act of Congress and make conduct criminal which such laws leave untouched."

Citing,

Waite v. *Macy*, 246 U. S. 606.

U. S. v. *George*, 228 U. S. 14.

U. S. v. *United Verde Copper Co.*, 196 U. S. 207.

4. The issue in this case, while far reaching in its effect, nevertheless is the case of a criminal indictment against the defendant Farrar. It is fundamental, therefore, that he should be informed beforehand that the act he is doing is criminal, and that he will be punished therefor.

In *U. S.* v. *Wilterberger,* 5 Wheat. 96, Chief Justice Marshall said:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime, and to ordain its punishment."—"To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provision, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, as those which are enumerated."

Again, this Court has said in *U. S.* v. *Reese,* 92 U. S. 214:

> If the legislature undertakes to define by statute a new offence and provide for its punishment, it should express itself well in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

In *ex Parte Webb,* 225 U. S. 663, this Court said:

> "We are reminded that 'laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.'

(U. S. v. Brewer, 139 U. S. 278); and that ambiguity and uncertainty about the meaning of a criminal statute ought to be resolved by a strict interpretation in favor of the liberty of the citizen."

SUMMARY.

It is submitted:

1. That the conclusion of the District Judge is irresistible, that "If Congress had intended to introduce such a revolutionary change in existing methods of dealing with the liquor problem, making the ordinary buyer criminally liable, it would have said so in no uncertain terms."

2. There is no ambiguity in the statute which permits the construction placed upon it by the Government. It is plain that section 6 deals with permittees, and that a penalty is provided for buyers who violate the terms of their permit. It was never contemplated that the purchaser from a bootlegger should have a permit.

3. If there is any ambiguity in the statute, the Congressional record of the debates upon the joint resolution which became the 18th Amendment, shows that the buyer was expressly left out of the acts prohibited by the 18th Amendment. One cannot escape the conclusion that this was done deliberately.

4. The National Prohibition Act, in section 6 of Title II, dealt exclusively with the problem of permittees, and the prevention of diversion of intoxicating liquor from medicinal and industrial uses to use for beverage purposes, and provided for that class of offenders.

5. Not until this case has any prosecuting officer indicted a mere buyer. Failure to prosecute the buyer must have had the approval of the executive department of the Government, and neither administrative necessity, nor convenience, can now make the buyer a criminal unless the law plainly makes him so.

6. The question as to whether Congress could make the purchase of intoxicating liquor criminal under the provisions and the powers contained in the 18th Amendment is not before the Court.

It is respectfully submitted that the decision of the District Court quashing the indictment should be affirmed.

Respectfully submitted,

JAMES A. CRESSWELL,
WILLIAM H. LEWIS.

SUPREME COURT OF THE UNITED STATES.

No. 732.—October Term, 1929.

The United States of America, Appellant, *vs.* James E. Farrar.	Appeal from the District Court of the United States for the District of Massachusetts.

[May 26, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

By indictment returned in the federal district court for Massachusetts, the defendant (appellee) was charged with unlawfully and knowingly having purchased intoxicating liquor fit for use for beverage purposes, in violation of the National Prohibition Act. The district court sustained a motion to quash the indictment on the ground that the ordinary purchaser of intoxicating liquor does not come within the purview of the act. 38 F. (2d) 515. The government appealed under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246; U. S. C., Title 18, § 682, and § 238 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938; U. S. C., Title 28, § 345.

Section 3 of the Prohibition Act, c. 85, 41 Stat. 305, 308, makes it unlawful for any person to "manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act . . . "; but provides that "Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold. . . . but only as herein provided, and the commissioner may, upon application, issue permits therefor: . . . ."

Section 6 of the act, 41 Stat. 310, provides: "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided . . . ." Following this language, the section regulates with much detail the issue, character, and duration of the permit,

and the application therefor, which application, among other things, must set forth "the qualification of the applicant and the purpose for which the liquor is to be used." The form of the permit and application, and the facts to be set forth therein are to be prescribed by the Commissioner of Internal Revenue, who is to require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and provisions of the act. A large part of the act, including § 6, is devoted to the subject of the authorized manufacture, sale, transportation, and use of intoxicating liquor for nonbeverage purposes; while § 3 plainly deals with the prohibited traffic in such liquors for beverage purposes.

The government relies upon the literal terms of § 6, that "No one shall . . . purchase . . . any liquor without first obtaining a permit from the commissioner so to do . . . "; but, at the same time, frankly concedes that the application of this language to the present case is not free from doubt. The contrary view is that these words, considered in connection with the other provisions of § 6 and correlated sections, relate only to that class of persons who are authorized to sell, purchase, or otherwise deal with intoxicating liquors for nonbeverage purposes, and who proceed to do so without a permit. That this defendant does not belong to that class, and could not, under any circumstances, have obtained a permit to make a purchase of the character here made, is not in dispute. The question thus presented is very nearly the same as that decided in *United States* v. *Katz,* 271 U. S. 354; and in principle is concluded by that case.

There, the defendants were charged with conspiring to sell intoxicating liquors without making a permanent record of the sale, in violation of § 10 of the act. The indictments were quashed in the district court on the ground that § 10, which required a permanent record to be made of sales, applied only to persons authorized to sell alcoholic liquor, and that the indictment failed to allege that either of the defendants held a permit or was otherwise authorized to sell. This court, in affirming the judgment, said (pp. 361-362):

"Of the thirty-nine sections in Title II of the Act, which deals with national prohibition, more than half, including the seven sections which precede § 10, contain provisions authorizing or regulating the manufacture, sale, transportation or use of intoxicating

liquor for nonbeverage purposes. These provisions, read together, clearly indicate a statutory plan or scheme to regulate the disposition of alcoholic liquor not prohibited by the Eighteenth Amendment, in such manner as to minimize the danger of its diversion from authorized or permitted uses to beverage purposes. These provisions plainly relate to those persons who are authorized to sell, transport, use or possess intoxicating liquors under the Eighteenth Amendment and the provision of § 3 of the Act, already quoted."*

And it was held (p. 363) that "the words 'no person' in § 10 refer to persons authorized under other provisions of the act to carry on traffic in alcoholic liquors," not to the ordinary violator of a provision prohibiting transactions in respect of liquors for beverage purposes.

It is not necessary to repeat the citation of authorities or the pertinent canons of statutory construction set forth in the opinion to support this conclusion. We are unable to find any logical ground for holding that the words "no person" in § 10 are used in the restricted sense thus stated, but that identical words in § 6, which forms a part of the same general plan for controlling the authorized traffic in intoxicating liquors, may be given an unlimited application. Obviously the National Prohibition Act deals with the liquor traffic from two different points of view. In the case of beverage liquors, except for sacramental and medicinal purposes, the traffic is prohibited absolutely and unconditionally; in the case of nonbeverage liquors, it is permitted but carefully regulated. The prohibitions in § 3 are with respect to the former; while those in § 6 are with respect to the latter. In the former the sale, but not the purchase, is prohibited; in the latter both are prohibited.

Since long before the adoption of the Eighteenth Amendment it has been held with practical unanimity that, in the absence of an express statutory provision to the contrary, the purchaser of intoxicating liquor, the sale of which was prohibited, was guilty of no offense. And statutes to the contrary have been the rare exception. Probably it was thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase. See *Lott* v. *United States*, 205 Fed. 28. However that may be, it is fair to assume

*This refers to the portion of § 3 relating to the manufacture, etc., of liquor for nonbeverage purposes and wine for sacramental purposes.

that Congress, when it came to pass the Prohibition Act, knew this history and, acting in the light of it, deliberately and designedly omitted to impose upon the purchaser of liquor for beverage purposes any criminal liability. If aid were needed to support this view of the matter, it would be found in the fact, conceded by the government's brief, that during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not including the purchaser in a case like the present; no prosecution until the present one has ever been undertaken upon a different theory; and Congress, of course well aware of this construction and practice, has significantly left the law in its original form. It follows that, since the indictment charges no offense under § 6, it was properly quashed.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.